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IN THE

Supreme Court of the United States

October Term, 1969

No. 316

DIANA KEARNY POWELL,

Petitioner,

v.

NATIONAL SAVINGS AND TRUST COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered April 9, 1969, in Appeal No. 22,223, *Powell v. National Savings and Trust Company.* (A-1).

OPINION BELOW

Judgment of the United States Court of Appeals for the District of Columbia Circuit, *Powell v. National Savings and Trust Company*, Appeal No. 22,223, rendered April 9, 1969, is without opinion, and is not yet reported. (A-1).

JURISDICTIONAL STATEMENT

Review is sought of a judgment of the United States Court of Appeals for the District of Columbia Circuit, entered April 9, 1969, affirming a judgment of the United States District Court for the District of Columbia, denying a Complaint for injunctive relief to restrain fraudulent conversion of real and personal property on the basis of rulings made pursuant to the misrepresentation, fraud, and collusion of the Defendant-Appellee.

This Court has jurisdiction under 28 U.S.C. 1254(1) and under the Constitution of the United States, Amendment 1, insofar as it relates to the right of petition for redress of grievances, and Amendments 4, 5, and 9, insofar as they relate to rights against unlawful seizure of property.

QUESTIONS PRESENTED

Questions presented for review, including subsidiary questions comprised therein, are:

1. Whether the United States Court of Appeals denied Petitioner rights of due process and against unlawful seizure of property, guaranteed by Amendments 4, 5, and 9 of the Constitution of the United States, by affirming, without opinion or comment except reference to related cases, judgment of the District Court arbitrarily dismissing injunctive relief seeking to restrain conversion of real and personal property pursuant to a judgment shown to have been based on mistake of fact and law resulting

from misrepresentations made by Defendant-Appellee as to material facts, the wording of a will, and the wording of cited precedents, contrary to well-settled principles of law and to prior decisions of this Court.

2. Did the United States Court of Appeals deny Petitioner rights of petition preserved under Amendment One of the Constitution and basic rights to seek in the Courts redress of grievances upon the settled law, applied to the facts of record, by affirming a judgment of the District Court, after Petitioner had been prevented by the Court with threats of criminal contempt from presenting evidence of fraud and misrepresentation as grounds for injunctive relief.

CONSTITUTIONAL PROVISIONS

Constitution of the United States:

Amendment 1: Congress shall make no law . . . abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

. . .

Amendment 4: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

Amendment 5: No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

. . .

Amendment 9: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

STATEMENT OF THE CASE

Judgment without opinion was entered April 9, 1969, by the United States Court of Appeals for the District of Columbia Circuit, Appeal No. 22,223, *Powell v. National Savings and Trust Company* (A-1), affirming the judgment of the United States District Court for the District of Columbia denying Petitioner's Complaint for injunctive relief from fraudulent disposition of property, and listing cases cited by Respondent as grounds for dismissal as *res judicata*, which were the same decisions which Petitioner sought to show were obtained by the misrepresentations, fraud, and collusion of Respondent.

Plaintiff Diana Kearny Powell filed a Complaint for injunctive relief from fraudulent disposition of property, May 29, 1968, in violation of her rights under Amendments 4, 5, and 9 of the Constitution of the United States. Motion of Defendant, National Savings and Trust Company, to dismiss the Complaint on the ground of *res judicata* was filed June 12, 1968. Plaintiff, Miss Powell, on June 18, 1968, filed Opposition to the Motion to Dismiss, and Request for Admissions as to the genuineness of documents which were records in related cases, specifically, in *Powell v. Powell* (C.A. 4051-55), the Complaint by Lucy Powell for appointment of the National Savings and Trust Company as Successor Trustee, showing that title to the property had vested in William Glasgow Powell, the testamentary trustee, who had died, and showing that the Appellee Trust Company had accepted the successor Trusteeship, without contest. These documents showed that distribution of property proposed by the Defendant Trust Company, which Plaintiff, Miss Powell, sought to enjoin, was predicated upon claims to title in conflict with the title of the trustee, and were raised for the first time by the Appellee Trust Company, after termination of the trust. Defendant Trust Company objected to the Request for Admissions on the ground that the

record speaks for itself. Motion of Plaintiff, Miss Powell, to strike the Motion to Dismiss on grounds of *mala fides* was filed June 27, 1968. Hearing on the Motions before Judge Sirica on July 3, 1968, was resolved in favor of the Trust Company on all points (Order entered July 5, 1968) after the Court initiated the proceeding by warning Plaintiff (Miss Powell) that he would find her in contempt of Court and incarcerate her if she argued the fraud and misrepresentation which were the grounds stated in her Complaint (Tr. 1, 3). The Court further stated, after repeated interruptions of Plaintiff's arguments, the Court's personal opinion of a senior member of the law firm representing the Defendant Trust Company, who had never actively participated:

> "You know who John E. Powell is? He was a very fine member of our Bar, a very excellent lawyer. He used to be a member of the Grievance Committee. I don't think he is dishonest or anything at all. I don't think he'd represent a dishonest client" (Tr. 7).

Plaintiff's Motion to Reconsider and Set Aside the Judgment on grounds it violated property rights protected by Amendments 4, 5, and 9, and rights of petition under Amendment 1 of the Constitution of the United States, as well as Plaintiff's Objections to the form of Order as exceeding the ruling of the Court, submitted July 5, 1968, and entered on the docket July 12, 1968, were denied by Order of July 18, 1968. Notice of Appeal was filed July 12, 1968, and the case duly docketed in the United States Court of Appeals.

ARGUMENT

1. The Court of Appeals has deprived Petitioner of property rights secured under Amendments 4, 5, and 9 of the Constitution of the United States by denying injunctive relief from an Order predicated upon false statements of fact and law, and disposing of property in conflict with decisions of this Court.

The United States Court of Appeals for the District of Columbia Circuit, affirming the District Court's denial of injunctive relief, deprives Petitioner of real and personal property which is rightfully hers, in conflict with the protections of Amendments 4, 5, and 9 of the Constitution of the United States (p. 3). In so doing, it has decided in conflict with the decisions of this Court in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, and in *Ochoa v. Hernandez*, 230 U.S. 139, 57 L.Ed. 1427, 33 S. Ct. 1033. The *Dartmouth College* case, applying the clause preserving the inviolability of contracts, and *Ochoa v. Hernandez*, applying property rights preserved by Amendments 4 and 5 in circumstances closely analogous to the instant case, each hold, in unmistakable terms, that the Government, or any agency of it, may not take property belonging to one person and give it to someone else.

Petitioner has repeatedly shown in the cases cited by Respondent as supporting its motion to dismiss on grounds of *res judicata*, that these decisions were predicated upon misstatements of fact, clearly shown to be false, and misstatements of cited case law, reaching by sophistic reasoning the exact reverse of established precedents, cited in *Pyne v. Pyne*, 81 U.S. App. D. C. 11, 154 F.2d 297.

Reliance by Respondent on misstatements of fact by the Court induced by Respondent's own knowing misrepresentations is fraud and dishonesty. Good faith

requires that the Court exercise its supervisory powers over lower federal Courts to restrain use of the Court to perpetrate fraud and to order correction of plain error that violates rights preserved by the Constitution.

Injunctive relief is in accord with the settled principle that *res judicata* is not a defense to review of a decision based upon fraud and/or mistake. Petitioner cites *New Orleans v. Gaines (New Orleans v. Whitney)*, 138 U.S. 595, 34 L.Ed. 1102, 33 S. Ct. 428; *Welch v. Mandeville*, (U.S.) 1 Wheat. 233, 4 L.Ed. 79:

> . . . it is generally held that the principles of *res judicata* may not be invoked to sustain fraud, and that a judgment obtained by fraud or collusion may not be used as a basis for the application of the doctrine of *res judicata*.

The continuing efforts of Miss Powell to obtain judicial correction of this gross miscarriage of justice are evidence that she has not been negligent in presenting the facts, and the continuing fact of the fraud of the Defendant is plainly visible in its defense of *res judicata*. In *Bennett v. Commissioners of Internal Revenue*, 113 F.2d 837, 130 A.L.R. 369, the Court held:

> The rule of *res judicata* is that one who has permitted a final judgment to go against him is estopped by that judgment from contending elsewhere, against the parties to it and their privies, that the fact or issue is otherwise than as there adjudged.

2. The Court of Appeals, in sanctioning by affirmance the arbitrary procedure in the District Court in threatening to hold Petitioner in contempt if she presented fraud as grounds for injunctive relief departs from normal procedures and violates the right to petition the Courts protected by the First Amendment and common law.

The Court of Appeals, by affirming the judgment of the District Court, clearly entered on prejudice and not on the facts, in effect, sanctioned arbitrary and capricious procedures of the District Court in threatening to hold Petitioner in criminal contempt if she presented her grounds for injunctive relief, that is, the fraud and deception of the Respondent, as it plainly appears in the undisputed facts of record in related cases.[1]

> THE COURT:
> . . . I want you to understand one thing, I don't want you to call names, I don't want you to call people frauds, because if you get out of line, contemptuous, I will put you right in jail, is that clear to you?
>
> MISS POWELL:
> I understand that, Your Honor –

---

[1] Prior related cases are *Powell v. Powell* (on appeal, *Powell v. National Savings and Trust Co.*), 111 U.S. App. D. C. 290, 296 F.2d 412, cert. den., 368 U.S. 946, 7 L.Ed. 2d 343, 82 S. Ct. 307, rehearing denied, 368 U.S. 1005, 7 L.Ed. 2d 547, 82 S. Ct. 597; *Powell v. National Savings and Trust Company*, 114 U.S. App. D. C. 269, 314 F.2d 274, cert. denied, 379 U.S. 920, rehearing denied, 379 U.S. 984; *Powell v. National Savings and Trust Company*, 384 U.S. 938, 384 U.S. 1027, 86 S. Ct. 1919; Administration No. 12,657, Estate of Diana Kearny Powell, widow, deceased (1905).

> THE COURT:
> Now just a minute, you listen to me. You have been litigating a long time on this matter and this is going to be your final chance in this court. If you do not obey the rulings of this court and stop talking when I tell you, I will consider citing you for contempt of court, is that clear to you? (Tr. 2-3)

Nothing appeared, or in fact existed, to warrant the threats, which themselves are prejudicial as suggesting improprieties and misconduct on the part of Miss Powell which did not exist. It is obvious that she is unable to present a case for relief from fraud without mentioning fraud and the persons she proposed to show were in collusion in perpetrating the fraud.

The Court openly admitted bias, and that the decision of the Court was the product of bias and favoritism, and not of sound judgment on the record. At one point, the Court interrupted argument by Miss Powell to state (Tr. 7):

> . . . You know who John E. Powell is? He was a fine member of our Bar, and a very excellent lawyer. He used to be a member of the Grievance Committee. I don't think he is dishonest or anything at all. I don't think he'd represent a dishonest client.

The sanctioning of such procedures is a clear violation of the most fundamental right – to petition the Court for redress of civil and criminal wrongs. It is of the essence of denial of freedom of speech and right of petition protected by Amendment 1 and included in the "rights preserved to the people" by Amendment 9, and is such a departure from orderly procedure as fully to warrant the special supervisory powers of this Court over lower federal Courts, both as to this case and as to the evidence it presents of collusion and fraud in related cases.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the judgment affirming the Judgment of the United States District Court dismissing the Complaint for injunctive relief from a judgment based on mistake, fraud and collusion.

Respectfully submitted,

DIANA KEARNY POWELL

1500 Massachusetts Avenue, N. W.
Washington, D. C. 20005

Petitioner, pro se

APPENDIX

[Filed April 9, 1969]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,223 September Term, 1969

DIANA KEARNY POWELL,
Appellant,

v. Civil Action 1307-68.

NATIONAL SAVINGS AND TRUST COMPANY,
Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Fahy, Senior Circuit Judge; Wright and Robinson, Circuit Judges.

JUDGMENT

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by appellant, *pro se*, and counsel for appellee.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the judgment of the District Court appealed from herein is affirmed. See *Powell v. National Savings & Trust Co.*, 111 U.S. App. D. C. 290, 296 F.2d 412, *cert. denied*, 368 U.S. 946 (1961), *rehearing denied*, 368 U.S. 1005 (1962); *Powell v. National Savings & Trust Co.*, 114 U.S. App. D. C. 269, 314 F.2d 274 (1963); *Powell v. National Savings & Trust Co.*, No. 17,658, decided November 19, 1963, *rehearing en banc denied*, January 15, 1964; *Powell v. National Savings &*

Trust Co., No. 18,292, decided May 19, 1964, *cert. denied*, 379 U.S. 920 (1964), *rehearing denied*, 379 U.S. 984 (1965); *Powell v. Paige*, 122 U.S. App. D. C. 397, 355 F.2d 108 (1965); *Powell v. National Savings & Trust Co.*, No. 19,782, decided March 11, 1966, *cert. denied*, 384 U.S. 938, *rehearing denied*, 384 U.S. 1027 (1966); *Powell v. National Savings & Trust Co.*, No. 20,967, decided October 23, 1967, *cert. denied*, 390 U.S. 957, *rehearing denied*, 390 U.S. 1037 (1968).

Per Curiam

For the Court:

Alexander L. Stevas
Chief Deputy Clerk

Dated: April 9, 1969.

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PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Diana Kearny Powell respectfully prays for reconsideration of the Order entered the 13th day of October, 1969, denying petition for writ of certiorari in the above-entitled case, and for a request by this Court directed to Respondent for a reply to this Petition for Rehearing, under Rule 58(2) and (3) of the Rules of this Court.

INTERVENING CIRCUMSTANCES AND GROUNDS NOT PREVIOUSLY PRESENTED

Petitioner respectfully represents to the Court that it is the urgent duty of this Court to review and correct the plain error resulting in serious miscarriage of justice.

Intervening circumstances not previously presented are as follows:

Chief Justice Warren E. Burger, newly appointed to the Supreme Court of the United States, did not participate in the action of this Court in denying certiorari. It is assumed his abstention is because of the relation of the instant case to *Powell v. Powell*[1] (*Powell v. National Savings and Trust Company* on appeal), in which case Judge Burger, as a Judge of the United States Court of Appeals for the District of Columbia Circuit, wrote the majority opinion. In that opinion appeared the material and patent error of fact, as well as error in the wording of the will which it interpreted on the basis of the error, and error in the citation of precedents, which this and other related cases seek to correct, on the Constitutional grounds that a judgment predicated upon material error of fact and law that completely frustrates the plain meaning of the will it purports to interpret, as well as refusal to correct the error, deprives Petitioner of basic constitutional rights of due process of law and a fair trial on the merits. *Ochoa v. Hernandez*, 230 U. S. 139, 57 L. Ed. 1427, 33 S. Ct. 1033.

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[1] *Lucy Powell v. Diana Kearny Powell, et al.*, on appeal, *Powell v. Nat. Sav. and Trust Co.*, 111 U. S. App. D. C. 290, 296 F.2d 412, cert. den., 368 U. S. 946, 7 L.Ed. 2d 348, 82 S. Ct. 307 (1961), rehg. den., 368 U. S. 1005, 7 L.Ed. 2d 547, 82 S. Ct. 597 (1962); 114 U. S. App. D. C. 296, 314 F.2d 274 (1963), 379 U. S. 920 (1964), rehg. den., 379 U. S. 984 (1965); 384 U. S. 938, 1027, 86 S. Ct. 1919 (1966), 390 U. S. 957, 1037 (1968).

To the best of Petitioner's knowledge and belief, the Chief Justice has no personal interest in the result of this litigation that he should disqualify himself. On the other hand, Petitioner points out that it should be a matter of grave concern and soul-searching on the part of the Chief Justice that because of errors which he made, which no one else is in a position to correct, and because of his neglect of his judicial duty to be the first to correct (*Scott v. State*, 323 S.W.2d 445, Tex. Ct. App. , *Cannons of Judicial Ethics*, Canon 20), irreparable damage and fraud has been perpetrated, and settled law controlling distribution of remainder estates reduced to a shambles.

The material errors of law and of fact have been defined in detail in related cases, which are incorporated by reference, the files being held in this Court for that purpose.

In the related proceeding, *In the Matter of Diana Kearny Powell,*[2] Judge Burger, as a witness under oath, testified on January 18, 1966, as follows:

> "Miss Powell, I have no recollection of the details of the particular case you are talking to me about. . . . I have not read the opinion in that case since it was written some five, six or seven years ago. I have not looked at the record since that time, . . ." Tr. 37-38.

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[2] *In the Matter of Diana Kearny Powell, Powell v. Committee on Adm. & Grievances,* Misc. 54-65, ___ F.2d ___, ___ U. S. App. D. C. ___, 87 S. Ct. 1487, 386 U. S. 1035, ___ L.Ed. ___, reopened (1967), ___ F.2d ___, ___ U. S. App. D. C. ___, file held in this Court, Oct. Term, 1967, No. 1200; *In the Matter of Diana Kearny Powell,* Disbarment No. 108 U. S. App. D. C., file held in this Court, Oct. Term, 1967, No. 974; in this Court, Misc. 882.

A few pages before this, the transcript (30-31) shows the following:

> "Q. Your Honor, is it not a patent misstatement of the record which was before you in the joint appendix in No. 16,071, when you stated: 'In 1958 the last survivor of five life tenants of the trust estate died?'
>
> "A. I don't have the total record before me, but if we said that in the opinion, I am confident that that is a correct reflection of the record. If it was not, the dissenting opinion would surely have pointed it out. And I do not recall whether the dissenting opinion undertook to deal with it or not; but if it was wrong and if it was relevant, it surely would have been called to our attention.
>
> "Q. Your Honor, isn't it a fact that that was called to your attention and the mistake was completely ignored on numerous occasions?"

The witness was not permitted to answer the question.

The record as it stands reveals that no attempt was made to review and correct the error in response to the continuing efforts of Petitioner to preserve her right to have the case determined on the true law and facts. The errors included such relevant and material facts as the status of Petitioner's father and date of his death, upon which Petitioner's claim as a remainderman substituted under the terms of the will was predicated, the identity of the trustee and the date and circumstances by which the trust was terminated and the title, vested in the trustee, became under the terms of the will the outright present property in the remainderman, and who were vested remaindermen, in being, ready and predetermined under the provisions of the will of testratrix and not

under any other instrument, to take the property at that instant, the termination of the trust. The misstatement of these facts of record and the chain of reasoning in the majority opinion states the claim of Petitioner, predicated solidly upon a completely lucid and unambiguous clause of the will, as though it were a contrivance to evade the distribution under the will. In doing so, the majority opinion frustrated the plainly stated, perfectly clear and completely natural distribution of the remainder stated in the will, to alienate the estate as though the testatrix had died intestate and Petitioner, the only person having a real interest and direct claim both under the terms of the will and under the natural law of descent and distribution, was non-existent and claiming as an alien.

In the above-cited testimony by Judge Burger, in the proceeding on the disbarment of Petitioner, because she addressed to the Attorney General a pleading seeking criminal prosecution of those responsible for the fraud and deception which, if his testimony is to be considered as being given in good faith, did in fact deceive and mislead him, he testified at page 32 of the transcript:

> "THE WITNESS: I believe you are misconstruing my response, Miss Powell. I said if it was relevant and if it was erroneous, it would have been made a point in the dissenting opinion, and I do not see that it was.
>
> There are many statements made in briefs and records which you, as a lawyer, or other lawyers might think important which the Court doesn't consider relevant or important at all."

Since by the Chief Justice's own testimony the record was not once reviewed in response to the successive actions alleging fraud and error, his abstention at this point would result in further protecting those responsible for the fraud and deception, and would raise a serious question as to his own good faith. Petitioner believes that the Chief Justice is acting in good faith, and is unaware that associates of those profiting by his decision and the suppression of the evidence of error and fraud were active in excluding Petitioner from presenting testimony and other evidence at the hearing on his confirmation.

WHEREFORE, Petitioner prays that review of the above-entitled case be granted, and that this Court request Respondent to submit a Reply, and for such other and further relief as to this Court seems proper.

Respectfully submitted,

DIANA KEARNY POWELL
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Washington, D. C. 20005

Petitioner, pro se

CERTIFICATE OF GOOD FAITH

I, Diana Kearny Powell, the Petitioner herein, hereby certify that the foregoing Petition for Rehearing of Denial of Petition for Writ of Certiorari is presented in good faith and not for delay, and that it is restricted to intervening circumstances of substantial effect, or which to the extent that they were available to petitioner, were not previously presented.

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